

ETHICS and the BUSINESS of the LAW

By Keith Rewell SC

Law is not an ordinary job. The legal profession has an important role in the administration of justice. As officers of the court and representatives of their clients, the community is entitled to expect that lawyers will comply with high ethical standards. But the practice of law is a business like any other; ethical standards are often under threat.



Photo © Moreno Soppelsa / Dreamstime.com

Law, and the justice system, depend on a constantly evolving set of technical rules that are not easy to understand. The community cannot be expected to trust lawyers with the task, if lawyers give up their ethical standards in their business dealings.

Ethics cannot be reduced to a simple set of clear-cut rules. Ethical standards are easily breached, but are difficult to enforce. Yet ethics give practical expression to the purpose for which a profession exists.

The commercialisation of legal practice in Australia has brought with it new concerns about what the profession stands for. A real tension exists between the ethical practice of law as a learned profession, and the demands of an increasingly competitive business environment.

No-one can doubt that introducing a more competitive market for legal services has had some advantages for clients. Monopolistic practices of the past needed to be modified or discarded. But an all-consuming focus on profit, driven by ever-increasing overheads and fierce competition, may create

a hopeless conflict between self-interest, and our fiduciary, ethical and legal duties.

MOTIVATED BY PROFIT?

As Bret Walker SC recently pointed out,¹ it is unfortunately undeniable that, in some law firms, money is already the main (or only) measure of performance, and criterion for promotion; but the ability to generate revenue is hardly an adequate indicator of professional skill and excellence. Indeed, at times quality of service and profitability may well conflict.

If the relationship between lawyer and client is motivated by profit, not service, the relationship may lose its essential objectivity; lawyers may become financially bound up in the cause, ignoring their independent role in the system of administration of justice.

Justice Kirby of the High Court puts the current dilemma in perspective.²

'The challenge before the legal profession in Australia is to resolve the basic paradoxes which it faces. To reorganise itself in such a way as to provide more effective, real and affordable access to legal advice and representation. To preserve, and where necessary to defend, the best of the old rules requiring honesty, fidelity, loyalty, competence and dispassion in the service of clients, above mere self-interest, and specifically, above commercial advantage. Yet to move with the changing direction of legal services in a global and national market.'

Where does this leave the ideals of professionalism and ethical conduct for those who practise the law? Can past ethical standards be maintained in a market stripped of barriers to competition and demanding a new level of accountability?

SOCIAL RESPONSIBILITY

Fortunately, across almost all areas of business, those who cling to the belief that the sole objective is maximisation of profits, are falling from favour. There is now a demand that businesses demonstrate at least a degree of social responsibility. The community is able to see beyond the prioritisation of short-term profits at the expense of the public good.

'Corporate social responsibility' applies equally to lawyers. And it is particularly significant to the legal profession, because lawyers rely on a perception on the part of the broader community that the conduct of at least most of their number is ethical and responsible, to support the legitimacy of the profession in the face of relentless criticism from media and government.

Chief Justice Spigelman³ has described the current state of play as a 'balancing exercise', in which the real value to clients of a free market for legal business is still the subject of debate. There is now a presumption in favour of (ethical) competition. But this is not absolute: governments have already acted to prohibit business strategies (such as advertising in some areas of legal practice; see the State-by-state round-up in this issue of *Precedent*) considered to be contrary to the public interest. If lawyers want autonomy in

A tension exists between the ethical practice of law as a learned profession, and the demands of an increasingly competitive business environment.

conducting their businesses, the impact of their actions on the community must be considered.

Barristers are called to account just as much as solicitors. The 'bankrupt barristers' debacle in NSW proved, to any who doubted it, that unethical commercial conduct by a few, fuels anti-lawyer sentiment against us all.

Those who contend that running a business and ethical legal practice are incompatible are risking our future. In the interests of its own survival, the legal profession must preserve ethical practice above pure commercial gain.

And, ultimately, it is to the profession's advantage that the community be reassured of its continuing commitment and its ethical duties, even if they do conflict with short-term profit. Any further loss of public confidence in the legal system may lead to a downturn in the demand for legal services and, ultimately, a lesser financial return for fewer lawyers.

What should our aim be? It must be to reject any commercial opportunity, however lucrative, that undermines the legitimate rights and expectations of the client; that constitutes an abuse by the lawyer of a position of trust; that causes a lawyer to breach professional or ethical duties; that compromises the lawyer's capacity to provide independent, objective advice; or that prevents the impartial resolution of disputes.

These are personal, as well as professional, standards. They are moral, as much as legal, requirements. A comprehensive set of rules can never be formulated, or properly enforced. Our motivation should be professional pride, not fear of punishment.

It comes to this: do you want your profession to prosper, while maintaining its dignity and credibility? Such questions are, or should be, rhetorical. ■

Notes: 1 B Walker *Lawyers and Money*, St James Ethics Centre, 2005, www.ethics.org.au. 2 MD Kirby, 'Legal Professional Ethics in Times of Change', *Australian Bar Review*, 1996, p14. 3 Spigelman, JJ, *Are Lawyers Lemons?*, St James Ethics Centre, 2002.

Dr Keith Rewell SC is a member of Jack Shand Chambers in Sydney. He practises in all forms of common law. He has a particular interest in the implications of tetraplegia and brain impairment. He appears frequently in the NSW District and Supreme Courts. He has been leading counsel in many common law cases before the Court of Appeal, and has appeared in the High Court and the Privy Council.